92-1654

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

LINDA A. LEAF,

Petitioner,

vs.

SUPREME COURT OF THE STATE OF WISCONSIN, BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY, GERALD STERNBERG, ROY KORTE, CHARLES STIERMAN, BRIAN HENDERSON, LYNNE LEVIHN, and UNKNOWN INSURANCE COMPANIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Can the state demand secret examination of confidential client files, even under the auspices of an attorney disciplinary investigation?
2. Under Feldman, can an attorney bring general constitutional challenges to state bar disciplinary rules and regulations in federal district court?
3. Can a state court adjudge a federal plaintiff's constitutional issues irrelevant, and determine them to be meritless without hearing, and then turn right around and use preclusion as a tool to block federal civil rights litigation on those issues?

PARTIES TO THE PROCEEDING BELOW

In addition to the captioned parties, the parties included Andrew B. Haynes as plaintiff in the District Court.

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OPINIONS BELOW

The United States District Court for the Eastern District of Wisconsin filed its Decision and Order dismissing for lack of subject matter jurisdiction on October 31, 1991 (A-I). On November 14, 1991, Petitioners filed their Motion For Reconsideration; on November 15, 1991, the court denied that motion (A-4).

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on November 12, 1992, and is reported at 979 F2d 598 (7th Cir 1992). Petitioners' timely Petition for Rehearing with Suggestion for Rehearing In Banc were denied January 8, 1993; the Petition For Writ Of Certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

None. All issues involve judicially created exceptions to federal court jurisdiction.

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is under 28 U.S.C. sections 1331, 1343, 2201, and 2202; 42 U.S.C. sections 1981, 1983, 1985, 1986, and 1988; and the Constitution of the United States, more particularly Article Four and the First, Third, Fourth, Fifth, Ninth, Tenth, Thirteenth, and Fourteenth Amendments thereto.

STATEMENT OF THE CASE

Petitioner, Linda A. Leaf (a white female and lawyer), and Andrew B. Haynes (a black male and Ph.D. consultant), the plaintiffs below, have been business associates and personal friends for eighteen years. Leaf was admitted to the Wisconsin and federal bar in 1975 and has always been a sole practitioner. Over the years Leaf openly and consistently advertised for the need for legal reform, and offered legal, social and business programs to pursue that goal. The programs were entitled Law Related Services.

In 1986 four grievances against Leaf were filed with the Wisconsin Board of Attorneys Professional Responsibility (hereafter: BAPR) which included many allegations of improper acts by Haynes. Leaf and Haynes responded to all of BAPR's questions. The case sat dormant

until 1989 when Leaf received a BAPR letter demanding that she produce nine years of client records of clients other than the four complaining witnesses; nine years of business records; nine years of personal tax returns; nine years of business tax returns; and nine years of Haynes' records (to be produced by Leaf; A-75). An attorney, defendant Stierman, the chairperson of the local BAPR investigating committee, had appointed himself as the investigator on Leaf's case and directed the issuance of this demand which was signed by other BAPR personnel. A few years earlier this same attorney had been opposing counsel on a major case of Leaf's which was concluded successfully on behalf of Leaf's client (A-92). Some of the alleged misconduct violations against Leaf pertained to activity in that case.

Although the disciplinary rules grant an accused attorney an absolute right to request that a different investigator be appointed once an attorney is given notice as to who is the investigator, and the rules require that notice must be given, Leaf was never informed that Stierman appointed himself the investigator (A-92).

Leaf and Haynes filed suit in federal district court on March 14, 1989. In Count I of the complaint Leaf challenged the constitutionality of Wisconsin SCR 21.14 and 22.24 (gag rule) which make it a misconduct violation for an attorney to make public, including informing her clients, about any BAPR activity prior to the filing of a formal disciplinary complaint.

The factual allegations of the Count I gag rule count related to a grievance

made by an opposing counsel in a 1988 estate case. By letter to the Wisconsin Supreme Court Leaf sought permission to communicate with her clients regarding the actions of the opposing counsel. She was denied permission (A-35, 37, 69). No disciplinary charges were filed against Leaf regarding this estate case grievance and the investigation was closed at the time Leaf filed her federal suit. Due to this gag rule the affected clients still do not know of the secret state inquiry into their case. In Count I Leaf sought a declaratory judgment that the gag rule was unconstitutional.

In Count II Leaf and Haynes sought damages and an injunction for violations of their civil rights, based on racial and sex discrimination, by the arbitrary and capricious interference with Leaf's law practice and Haynes' business activi-

ties, inter alia. Count III was between Leaf and Haynes and all of the defendants, adding Henderson and Levihn, both lawyers, for a racially motivated conspiracy to violate Leaf's and Haynes' civil rights. Henderson and Levihn were alleged to have filed a spurious multi-million dollar state lawsuit against Leaf and Haynes for the sole purpose of embarrassing and humiliating them (A-51). The suit contained scandalous allegations of sexual assault and false imprisonment against Leaf and Haynes. It was dismissed for lack of prosecution before this federal suit was filed; no summons had been served (A-90).

The district court on April 28, 1989, abstained the entire lawsuit under Younger. However, the court did recognize that not all of Leaf's and Haynes' claims were cognizable in the state proceeding

(A-II). In response to the court's inquiry, the state, representing all defendants except Henderson and Levihn promised the court that Leaf would be able to raise her constitutional claims in the course of the BAPR proceedings.

Formal disciplinary charges were issued against Leaf by BAPR in October, 1989. During the discovery and trial process whenever Leaf attempted to raise her constitutional claims against the disciplinary rules and process and her civil rights claims against BAPR officials she was told that those issues were irrelevant. She was never allowed to discover or present evidence on those claims.

The Wisconsin Supreme Court adopted all of the referee's findings of fact and recommendations, and suspended Leaf for six months from the practice of law. The

Wisconsin court affirmed, without explanation, that Leaf's constitutional claims had no merit and are unsubstantiated. The findings included that Leaf was guilty of non-cooperation with a BAPR investigation, a misconduct violation, because she refused to provide the records demanded in the 1989 letter.

Leaf and Haynes then returned to federal district court in November, 1991. A proposed Amended Complaint (A-55) included all of the original claims and added new ones. The new claims were: 1. a constitutional challenge seeking declaratory and injunctive relief to the disciplinary rules under which the 1989 letter demand was issued as being an unreasonable search and seizure (as to Leaf's clients, business associates, and herself) and a violation of both the attorney/client privilege and the right of

Leaf's clients against self-incrimination; 2. a constitutional challenge seeking declaratory and injunctive relief to the stated Wisconsin policy that the attorney disciplinary rules and procedures are not bound by federal constitutional rights except for the attorney's right against self-incrimination; 3. a constitutional challenge seeking declaratory and injunctive relief to the BAPR nebulous "pattern of practice" policy; 4. a claim seeking declaratory and injunctive relief and damages for the violation of the constitutional and civil rights of Leaf and Haynes prior to and concurrent with Leaf's disciplinary hearing; 5. a claim seeking declaratory and injunctive relief and damages for a racially motivated conspiracy to violate the constitutional and civil rights of Leaf and Haynes; and, 6. a claim for damages for

failure to prevent the constitutional violations and the conspiracy to commit said violations.

On October 31, 1991, without motion or hearing the district court dismissed the entire lawsuit reasoning that all of the claims were inextricably intertwined with the Wisconsin court's decision (A-1). Leaf and Haynes appealed to the Seventh Circuit, which affirmed the dismissal of all of Leaf's claims but reversed the dismissal of Haynes' claims (A-7).

Leaf and Haynes petitioned the Seventh Circuit for rehearing with suggestion for rehearing in banc. The Seventh Circuit denied the petition (A-29).

REASONS FOR GRANTING THE WRIT

The Decision Below Is Incorrect

As a result of groundless presump-

tions, the courts below improperly commingled Leaf's civil rights and constitutional claims into a unidentified grouping. The factual allegations for the Count I gag rule claim involved a disciplinary investigation of Leaf in which no charges, and hence no disciplinary trial, were ever brought. It was a closed incident at the time of the initial filing of the federal lawsuit.

Leaf's Henderson and Levihn claim pertains to Henderson's filing of a state lawsuit against Leaf which was ultimately dismissed for lack of prosecution.

Since, since Henderson and Levihn, like Haynes, were not parties in the state disciplinary trial against Leaf, they were not involved in the state action and the claims involving them could not be raised. The panel below erred in claiming that the gag rule count and the

Henderson and Levinn count were inextricably intertwined.

The district court correctly initially found issues in plaintiffs' original suit that were not cognizable in the state disciplinary action. But when Leaf returned to the district court, it refused - without explanation - to address those issues in denying federal jurisdiction to plaintiffs. The district court held no hearing or inquiry to determine which federal claims and constitutional issues were determined by the state court or could have been raised in the state action. Indeed, despite their burden of proof, the federal defendants brought no motion and presented no evidence. The district court just presumed plaintiffs out of court. The fundamental unfairness of this decision is highlighted by its application to plaintiff Haynes.

In the gag rule count, Count I, Leaf was barred by BAPR and the Wisconsin Supreme Court from advising her clients in a then pending estate case of a disciplinary complaint made by the opposing counsel in the case. Her clients are still unaware of the secret state conduct affecting their rights and interests because Leaf is still under the gag rule.

Leaf sought permission from the Wisconsin Supreme Court, via letter, to inform her clients of the actions of opposing counsel in the making of a complaint against her in their case. The Wisconsin court refused. Leaf's gag rule count challenges the constitutionality of this disciplinary rule. The facts are almost identical to the facts in Ktsanes v. Underwood, 560 F.2d 790 (7th Cir 1977), just substitute bar "disciplinary" rule for bar "admission" rule, where the

federal plaintiff had sought waiver of a bar admission rule; the Seventh Circuit ruled the constitutional challenge could be brought in federal court.

Although the state in its brief filed in the court below falsely argued that Leaf's gag rule challenge was raised in her disciplinary proceedings, Leaf's motion for sanctions clearly spells out the procedural and historical distinction between Leaf's gag rule count from Leaf's other counts (A-132). The state never filed a response to the sanctions motion. The panel's decision summarily denied Leaf's sanctions motion without any findings or explanation.

Abstention does not accomplish what it is designed to (a state ruling may clarify or resolve the constitutional issues) if the federal plaintiff cannot even raise federal constitutional chal-

lenges in the state proceeding. It merely delays the inevitable federal action following the state proceeding and postpones the possible vindication of the federal plaintiff's constitutional rights.

The decision below was incorrect in its factual finding by presuming that Leaf's claims were decided by the Wisconsin court. As demonstrated by the record, Leaf's constitutional claims were deemed <u>irrelevant</u> and she was prevented from discovering and presenting evidence on them.

Initially, in order to trigger abstention, the state promised the district court that Leaf could raise her constitutional claims in any state disciplinary proceedings. However, when Leaf tried to raise those claims, she was rebuffed, as demonstrated by the record (from tran-

p 14, ln 17:

Mr. Roethe: "The only objection that is valid to your duty to cooperate is that this information might tend to incriminate me under the fifth amendment."

p 16, ln 14:

Mr. Roethe: "...Haberman specifically found there is no constitutional right not to testify or to produce records."

p 27, ln 1:

Referee Regez: "Well, we're not going into constitutional questions."

Transcript of May 11, 1990, hearing, p 3, ln 10:

Mr. Roethe: "...Number two, the Board of Attorneys Professional Responsibility is not on trial here. Bad faith, BAPR's policies and procedures; and BAPR's investigation is not the issue here...

...Andrew Haynes is not a party to these proceedings. His interests are not involved..."

Transcript of July 18, 1990, hearing, p 52, ln 17:

Referee Regez: "...In other words, I'm not going to permit this hearing to develop and degenerate into putting the Board on trial...

This form (sic) is not for the purpose of trying the Board of Attorneys Professional Responsibility."

Leaf's Interrogatories to BAPR:

Question #30: "Please state all procedural safeguards to insure document requests by Board district investigations:

develop and degenerate into putting the Board on trial...

This form (sic) is not for the purpose of trying the Board of Attorneys Professional Responsibility."

Leaf's Interrogatories to BAPR:

Question #30: "Please state all procedural safeguards to insure document requests by Board district investigations:

a. are for relevant documents only.

b. do not violate the constitutional rights of respondent attorneys and their clients; and

c. are not otherwise abusive or ultra vires."

BAPR answer: "Objected to on the grounds that the information sought in the question is not relevant nor likely to lead to relevant information."

(BAPR objected to nineteen of Leaf's interrogatory questions regarding BAPR's conduct in the same fashion. All objections were sustained by Referee Regez.)

Trial Denial

Trial transcript, vol 3a, p 453, ln 23:

Mr. Roethe: "The Board's investigation and the Board's reports have all been ruled irrelevant and immaterial in this proceeding by Your Honor in discovery proceedings, and they are immaterial. We're not going to put the Board on trial here, Your Honor, and that's your own words and that's the law."

Referee Regez: "That's right..."

Trial transcript, vol 3a, p 455, ln

17:

Referee Regez: "I think that's immaterial...Because I have ruled that the Board was not going to be put on trial in this case..."

Trial transcript, vol 3a, p 469, ln 3:

Ms. Leaf: "The offer of proof is, Your Honor, that the Board has in its possession stolen documents..."

ln 19:

Referee Regez: "Sustained. I don't think it's material."

Trial transcript, vol 3a, p 511, ln 23:

Mr. Roethe: "Same objection. What the Board's policies is are is irrelevant and immaterial."

Referee Regez: "Sustained."

Trial transcript, vol 3a, p 532, ln 13:

Ms. Leaf: "Does the Board have a procedure to identify potential conflicts of interest between an investigator and a respondent attorney?"

Mr. Roethe: "Objected to, irrelevant and immaterial."

Referee Regez: "Sustained."

Trial transcript, vol 4, p 855, ln 6:

(When questioning Diane DeMerchant) Mr. Ollivier: "...to attack the credibility of this witness to show that these were not her ideas and words, but rather these were manipulated and made by Paul Dallas."

Mr. Roethe: "It's all objected to as

irrelevant and immaterial."

Referee Regez: "Sustained."

Trial transcript, vol 4, p 856, ln 5:

Mr. Roethe: "That's ridiculous, and it's irrelevant and immaterial what the Board new (sic) or believed."

Referee Regez: "Sustained."

Trial transcript, vol 6, p 199, ln 6:

Mr. Roethe: "I'm going to object to constitutional issues. They do not create a defense under the rules of professional responsibility other than the Fifth Amendment."

Trial transcript, vol 6, p 247, ln 12:

Mr. Roethe: "The Board has nothing to do with this. The Board is not on trial here. This is irrelevant and immaterial."

Referee Regez: "Sustained."

BAPR counsel's (Roethe) trial brief, p 10:

"The only constitutional protection which an attorney has in a misconduct investigation, proceeding, or prosecution is the privilege against self-incrimination."

The above examples certainly do not cover all of the circumstances in which Leaf was prevented from effectively, adequately, and meaningfully raising her

constitutional claims.

Although the state made broad claims to the panel below that Leaf raised her constitutional claims in the disciplinary proceedings, the state presented no evidence by citations to the record to contradict the fact that Leaf's constitutional and civil rights claims were blocked in that they were ruled irrelevant. As proof that her claims were considered, the state merely quoted from the Wisconsin court's decision that Leaf's constitutional claims had no merit. Ivy Club v. Edwards, 943 F.2d 270, 275 (3rd Cir 1991). The parties can not be bound by disputed issues determined irrelevant by the state court (see: Ivy Club, at 284).

In their Amended Complaint Leaf also charged that she was denied her constitutional right to access to the courts

because of the above scenario. This constitutional claim of deprivation of the right to access to court, having become ripe only after her treatment in the state court, was obviously not litigated in the state action.

Because the state actors (who are the federal defendants) are members and agents of the state judiciary, it is unlikely that an impartial examination of the plaintiff's federal claims were made in state court of state constitutional misconduct. This is especially true if the claims of the federal plaintiff involve a state conspiracy by the federal defendants (members and agents of the state judiciary) to deprive the federal plaintiffs of their constitutional right to a federal trial.

Although the panel below did not expressly rule that federal district

court jurisdiction should not be exercised in cases involving bar disciplinary rules, that is the result of its decision. Since bar disciplinary matters will by their very nature touch on some state judicial action, under the panel's analysis in this case, any constitutional claims to state bar disciplinary rules are likely to invoke either inextricably intertwined or res judicata/collateral estoppel, and thus prevent federal jurisdiction. This in effect would nullify District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983). Feldman holds that whether the state bar action was a judicial proceeding or not, general constitutional challenges to bar admission rules can be brought into federal district court. Therefore, it is inappropriate to apply a different standard to bar disciplinary

rules.

Even if it is argued that litigants can preserve their federal court jurisdiction by not raising their constitutional claims in the state proceeding (though inextricably intertwined may still operate as a bar), Leaf chose to litigate her federal claims in federal court and was involuntarily thrown into state court because of abstention. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 84 SCt 461, (1964) requires her to at least bring those claims to the attention of the state court, which she did. It was the state court actors which deemed those claims irrelevant in the state proceeding. To allow the state actors, who are the federal defendants, to reap the benefit of blocking Leaf's claims in the state court to bar the claims from a

federal forum is a gross injustice and sets a dangerous precedent: in any civil rights litigation where the federal defendants are connected with the state judiciary, by simply ruling that the federal plaintiff's claims are irrelevant in a state action, the claims are defeated without ever getting to the merits in either the state and federal actions. In essence, state actors would be immune from federal civil rights liability.

If the panel's interpretation of Feldman is allowed to stand, all attorneys subject to disciplinary actions will be denied, as a matter of law, the right of access to the federal courts. Further, because of the gag rule, citizens have no knowledge of secret state violations of their federal rights and, therefore, they are also denied access to the federal court. Leaf's duty to protect her clients

constitutional rights allows her standing on their behalf.

Edmonson v. Leesville Concrete Co., Inc., __ U.S. ___, 111 SCt 2077, 2078 (1991).

Because the panel's intrepretation of Feldman blocks Leaf's constitutional challenges to the gag rule and disciplinary investigation rules, Wisconsin now has a judicially mandated state right to order attorneys not to advise their clients of secret state inspections of their clients' confidential files.

To interpret this civil rights complaint as an appellate review of the state decision would result in the anomaly of no legal procedure to bring constitutional challenges to the attention of the federal courts, making states the predominant arbitrator of federal constitutional rights. Under the panel's interpretation of Feldman, to approach the

federal district court is seeking a review of the state court decision. Therefore, as a matter of law, the determination of attorney's constitutional rights will be confined to the very entity accused of the unconstitutional acts.

Leaf's second, third and fourth counts of the Amended Complaint contain general constitutional challenges to Wisconsin attorney disciplinary rules and procedures. Among those challenged is the rule that subjects an attorney to discipline if the attorney does not "fully" cooperate with a BAPR investigation. Leaf asserts that the rule is unconstitutional because there is no provision for legitimate exceptions or hearing on objections, such as demands for wholesale production of nine years of client records. It permits unsupervised and secret government intrusion into an attorney's client re-

cords in violation of attorney/client privilege, the client's right against self-incrimination, unconstitutional search and seizure, etc. The disciplinary process provides no mechanism to object to any unconstitutional or even criminal acts without first incurring an automatic violation.

Simply by bringing any disciplinary claim against an attorney, the state may have secret access to the personal and confidential files of any citizen who has hired an attorney. By the panel's ruling, an attorney can not object, inform the client or seek access to the federal courts to protect federal constitutional rights of his clients' or himself.

How can the state court's superficial holding that the federal plaintiffs' claims are without merit and "unsubstantiated" be a meaningful decision on the

merits, if those same issues were deemed irrelevant at the trial level? The state court decision does not specify which constitutional claims have no merit or why. Paine Webber, Inc v. Farnam, 870 F2d 1286 1291 (7th Cir 1991). The Seventh Circuit should not irrebuttably presume that they are the same constitutional claims plaintiffs bring into federal court, especially when the state, charged with establishing the elements for preclusion (Democratic Cent. Com. v. Wash. Met. Area Tr. Comm., 842 F2d 402, 409 (DC Cir 1988) and Gray v. Lacke, 885 F2d 399, 406 (7th Cir 1989); interpreting Wisconsin law), presents no evidence that the constitutional issues claimed to have no merit are the same as those brought into federal court. Therefore, federal subject matter jurisdiction, which unquestionably existed when federal suit was first

filed, has not been destroyed.

Whether the federal suit fails because of preclusion or because it is characterized as a quest for a review of the state decision, the result is the same - loss of access to a federal forum for the purposes of fact finding and relief. And, when there was no fact finding in the state action because the federal issues were deemed irrelevant, the result is no forum at all. To accord the full bar of res judicata, collateral estoppel and inextricably intertwined without explanation or discussion, as the lower court has done, is to have the federal court place its imprimatur on this conspiracy. Because Leaf was denied any opportunity to litigate her constitutional issues in state court, none of the issues can be inextricably intertwined. U.S. v. Napper, 887 F2d 1528, 1534 (11th

Cir 1989).

Public Policy Requires That Certiorari Be Granted

Although it was brought to their attention, the opinion of the panel below does not even mention the fact that Leaf's federal claims were ruled irrelevant in the state disciplinary action. The integrity of the judicial process requires that relevant and crucial facts can not be ignored in the decision making. The substance of due process is betrayed when a court issues a decision that may look rational and grounded on legal principles, but does not relate to the facts of the case before it; facts that were either ignored or deliberately blocked from presentation. The public is fooled because while the "reasoned" decision is published, the factual record is not.

The quality and honesty of judicial decisions also affects the general public. If judges can ignore the pertinent facts put before them, what is the foundation for due process and the rule of law? The message needs to be sent that courts can not neglect relevant facts to an issue in order to find against a litigant they may not like.

It is precisely because a state court has such a strong interest in upholding the validity of its own bar disciplinary rules and procedures and whitewashing the conduct of its own agents that an independent forum in the federal district court should be preserved. But the broader problem reflected in this decision is whether state courts can absolutely close the federal courthouse doors to any litigant by pretending to rule "on the merits" of an issue when

tional issues. Federal defendants can thereby deprive federal plaintiffs of federal district court jurisdiction by merely claiming to "rule" on the issue in a state proceeding.

The result and the precedent set by the Seventh Circuit decision in this case does not reflect good law or practical living. Because of the decision's erroneous application of Feldman, the precedent is set that an attorney will never be able to challenge the constitutionality of a state bar disciplinary rule in federal district court on the merits.

The unique circumstance of lawyers, because they are supervised and disciplined by state courts (unlike any other profession), is that any attorney disciplinary matters must involve a state court, usually the highest court of the

because they are supervised and disciplined by state courts (unlike any other profession), is that any attorney disciplinary matters must involve a state court, usually the highest court of the state. Therefore, abstention under Younger v. Harris, 401 U.S. 37, 91 SCt 746 (1971) and inextricably intertwined will usually be claimed to apply to restrict federal court jurisdiction. If the Feldman rule that federal district courts do have subject matter jurisdiction of general constitutional challenges is diluted or erroneously applied, such as in this case, the result is that there will be virtually no right to federal subject matter jurisdiction.

In practice, the results of the precedent set by the Seventh Circuit's decision is this case could lead to national judicial disarray as parties jock-

ary rule depends more on parochial whim than law or merit. Following this precedent, it is difficult to imagine any circumstance in which a federal district court would have subject matter jurisdiction of a challenge to an attorney disciplinary rule unless the parochial agenda willed it.

A further unique hardship on lawyers is that since disciplinary rules are promulgated by state courts, it leaves the determination of the constitutionality of a particular disciplinary rule or practice in the hands of the very body that created it. The normal checks and balances intended by the separation of powers between the branches of government does not exist in attorney disciplinary matters.

At first blush the complaints of a suspended attorney about the disciplinary

powers between the branches of government does not exist in attorney disciplinary matters.

At first blush the complaints of a suspended attorney about the disciplinary rules may seem unimportant and insignificant. After all, must not the attorney have engaged in some unethical behavior? And, isn't the code of professional conduct and rules enforcing it there to protect the public? So what if attorneys are second class citizens, as long as the public is protected and the legal profession is held to a high ethical standard?

But all of that rests on the presumptions: that the particular attorney is guilty of some wrongdoing; that the disciplinary process is void of politics or prejudices; that a disciplinary rule is for the benefit of the public and promotes the quality of the profession as

opposed to protecting the legal institutional turf, private interests, and status quo; that disciplinary rules and procedures are constitutionally valid; and, that the same judicial body which promulgates a rule can fairly evaluate that rule's constitutionality and the conduct of its own agents. For example, one can legitimately ask: Does the challenged gag rule operate for the benefit of the public or to protect lawyers? How does the gag rule's forbidding an attorney who is being investigated from telling anyone, even his own clients, protect the public? How can the public make an informed judgment as to the effectiveness and fairness of the attorney disciplinary process when the vast majority of disciplinary matters are conducted in secret?

Many American citizens would be stripped of the protection of the Bill of

Rights by state and federal judicial rules forbidding an attorney from notifying his clients of the secret state examination of their records.

From 1979 to 1992 there was an average of 1,111 complaints per year of ethical violations by lawyers made to the Wisconsin Board of Attorneys Professional Responsibility. These complaints to BAPR resulted in an average of 30.92 formal actions per year (2.78%). Because of the gag rule, all of the complaints that were dismissed were done in secret; 97.22% of them. The public has little information on the claimed ethical violations. More importantly, the public has no idea of why the allegations were dismissed in 97.22% of the grievances filed against attorneys. Furthermore, formal action (2.78%) does not necessarily mean public exposure. There is a form of discipline

called a "private reprimand" which is just that - private.

Granted, the interest of the states in regulating lawyers is especially great since lawyers are essential to the distribution of justice, and are officers of the courts. But the panel's precedent now gives the states absolute control of lawyers and their and their clients' access to federal district court. It ignores the reality of the federal interest at stake in the quality of the bar. Often admission to or discipline from a state bar precipitates parallel action from the federal bar. Therefore, the quality and degree of politicalization of a state bar membership seeps into the federal bar, locale by locale.

Making attorneys second class citizens does not promote ethics and morality within the legal profession. Indeed, it

has the opposite effect. It enables those who are politically well connected and malicious to ruin attorneys who are critical of the legal status quo and demand legal reform.

At the risk of offending the quite understandable "esprit de corps" of the judiciary, one of the motives of BAPR is to keep reform minded attorneys in line by the abuse of institutional prerogatives and ungrounded irrebuttable presumptions of the correctness of the acts of its agents.

Deprived of federal subject matter jurisdiction, the local politicalization of bar rules and their enforcement proceed virtually unchecked. While what may happen to individual attorneys may seem of little public consequences, but for this Court's ruling, attorneys would not be allowed to advertise because such

creation of the independent counsel and special prosecutor), the state judiciaries can not also impartially judge the conduct of its own agents or the constitutionality of its own rules and regulations. To hold that an attorney has only the option to apply to this Court by petition for certiorari for review of the state decision, statistically denies him a right to a fair trial on any constitutional issues, and denies this Court of district inquiry, investigation and determination.

Even if attorneys are second class citizens, certain fundamental constitutional rights should not be taken away. An attorney should not be absolutely precluded by doctrines of inextricably intertwined, res judicata, collateral estoppel, or Younger from any federal district court jurisdiction regarding bar

An attorney should not be absolutely precluded by doctrines of inextricably intertwined, res judicata, collateral estoppel, or Younger from any federal district court jurisdiction regarding bar matters. After all, these doctrines are not constitutional principles. One's constitutional right to a fair forum (whether state or federal) on claims of constitutional and civil rights violations should not take a back seat to court created doctrines which are designed to promote full faith and credit and judicial economy.

It appears that the district court and the circuit panel have been so prejudiced by the antagonistic portrayal of Leaf and Haynes by the Wisconsin court to presume her out of federal court. The panel's decision comes close to commanding a finding that Haynes' claims are

frivolous (even though he has had no opportunity to prove them and the court had no record from the state or district court), simply because they find them difficult to believe (A-10). Here the Wisconsin court has painted legal reformers as criminals, under argumentum ad hominum (when you can not disprove the idea, attack the man), which have improperly affected the district court's and the circuit panel's perceptions of Leaf and Haynes. Without being given the opportunity to disprove the falsehoods, the presumptions should not be allowed.

For example, the circuit panel's statement in its decision, adopting the Wisconsin court's findings: "Leaf also represented to four clients that Haynes was her legal assistant, her assistant or her legal associate - though there was no employer-employee relationship between

Leaf and Haynes" (Decision, p 2; A-8). This is misleading. Leaf has never referred to Haynes as her "legal associate". More importantly, the Wisconsin rules of professional conduct do not require a legal assistant to be an employee. Official comments to the rule regarding responsibilities to nonlawyer assistants state: "Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services." (emphasis added) But by reporting this portion of the Wisconsin court's decision as an example of Leaf's alleged misconduct, the Seventh Circuit has set the precedent that it is a professional ethical violation for a lawyer to use a paralegal who is not an employee of that lawyer.

The Wisconsin court's decision has

Leaf's clients. Since Haynes was not a party to the attorney disciplinary proceedings and Leaf was not present when any of Haynes' alleged misconduct took place, it is an affront to due process to make a factual finding incriminating someone while at the same time handcuffing the person trying to defend himself. When allegation after allegation is handled in this manner, it becomes extremely difficult to unravel, especially when you are limited to legal issues on appeal and are deprived of any fact finding forum whatsoever. A limited presentation of the errors in the Wisconsin court's decision and the Seventh Circuit's adopted findings is contained in (A-146).

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The dilemma is this. If Leaf is restricted to applying for certiorari to this Court from the Wisconsin court, she is deprived of a fair fact finding forum. This Court does not hold de novo fact finding hearings. If Leaf goes into federal court to try to prove how and why the conspirators generated the falsehoods (something she was prevented from doing in the state action) she is thrown out for seeking a review of the Wisconsin court's decision. Indeed, this is the very quandary in which the state conspirators intended to place Leaf (and Haynes). What greater damage to the reputation of a Wisconsin lawyer then to have falsehoods of ethical violations adopted as factual findings by the Wisconsin court? Leaf is in the undesirable position of having to persuade the lower

court and now this Court of the correctness of her legal position while not being able to rebut the factual findings. The precedent set by the panel's decision puts every lawyer, and citizen, in the same dilemma; depending on whim is not good law.

With the tremendous increase in the criminal caseload facing the federal judiciary in recent years, it is understandable that the mistreatment of one attorney, depicted as evil and unethical, creates little sympathy. Good law is not the only victim of this precedent. Unfortunately, the integrity of the judiciary also falls victim. The time available to do justice continues to shrink even though many wrongs sought to be redressed through civil action can be just as damaging to the public as some of the worse criminal acts.

Before exercising abstention, the court must first consider whether the federal plaintiff will have an adequate opportunity to raise its constitutional challenges in the state proceeding. Middelsex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 SCt 2515 (1982). Middelsex holds that there should be no abstention when there is a showing of bad faith, malice, or harassment on the part of the state court. What stronger showing of bad faith then when the state, in order to trigger abstention, tells the federal court that the federal plaintiff can raise his constitutional issues in the state action, but when the federal plaintiff attempts to assert his constitutional claims in the state action, he is told that they are irrelevant.

CONCLUSION

The determination of Leaf's federal constitutional and civil rights claims are made by presumption without basis in fact. The District Court and Circuit Court both presume that the unsupported and unexplained one-sentence statement of the Wisconsin Supreme Court parroting the referee as to no merit resulted from full hearing when, as shown by BAPR's own transcripts, Leaf was not allowed to raise any constitutional matters; the irrebuttable presumption that the attorney disciplinary action considered/acted on a federal claim is clear error and requires reversal to prevent the setting of improper constitutional precedent for all courts. Having denied the federal plaintiff the opportunity to litigate her constitutional claims in state court

where Leaf was forced to be, the state supreme court should not be allowed to litigate by fiat of unexplained no-merit ruling on unspecified constitutional rights.

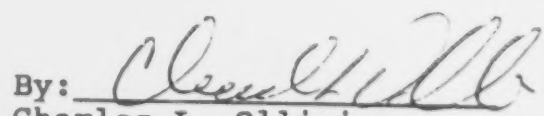
Federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them (McCarthy v. Madigani, ___ US ___, 112 SCt 1081, 1087 (1992). Judicially created exception to federal jurisdiction are just that, limited exceptions designed to accomplish a limited purpose. District courts have a duty to specifically "win-now out" claims under such exceptions from those ripe for federal jurisdiction (Rogen v. Supreme Court of Virginia, 590 FSupp 102, 108 (ED Va, 1984). This determination is a question of federal law (Levine v. Supreme Court of Wisconsin, 679 FSupp 1478, 1485 (WD Wis 1988)). Any

exceptions to federal jurisdiction must not be imposed absent evidence and hearing proving the need for exception; exception by presumption violates constitutional rights of due process and access to the federal courts for federal issues.

For the reasons set forth above, petitioner Linda A. Leaf, prays that a Writ of Certiorari be granted.

April 8, 1993

Respectfully submitted,
LINDA A. LEAF

By: 

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